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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WALTER OLSZEWSKI, Plaintiff and Appellant, v. HSBC BANK USA NATIONAL ASSOCIATION, as Trustee, etc., et al., Defendants and Respondents.	B285991 (Los Angeles County Super. Ct. No. BC643324)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Walter Olszewski, in pro. per., for Plaintiff and Appellant.

Wright, Finlay & Zak, Jonathan D. Fink and Ruby J. Chavez, for Defendants and Respondents.

Plaintiff Walter Olszewski (plaintiff) sued defendants HSBC Bank USA National Association, as Trustee (HSBC), National Default Servicing Corporation (National Default), and Select Portfolio Servicing, Inc. (SPS) (collectively, defendants) to obtain cancellation of a deed of trust and a related assignment after defendants commenced nonjudicial foreclosure proceedings. The trial court sustained defendants' demurrer to the complaint and gave plaintiff time to file a motion for leave to amend if he sought to assert other causes of action he believed to be viable. Plaintiff later filed an amended complaint without a motion for leave to amend. The trial court dismissed the action because no motion for leave to amend had been filed. We are asked to decide on the record presented, which does not include reporter's transcripts from the hearing at which the court dismissed the action and a later ex parte hearing, whether the dismissal was an abuse of the trial court's discretion.

I. BACKGROUND[1]

Plaintiff was the owner of a home in Altadena, California (the Property). In 2007, plaintiff and his wife obtained a $632,000 loan from AFTRA SAG Federal Credit Union (AFTRA

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[1] Our recitation of the facts here is based on allegations in plaintiff's complaint, documents attached to the complaint, and documents defendants asked the trial court to judicially notice. (Evid. Code, §§ 453 [trial court must take judicial notice of noticeable matters if requesting party provides sufficient notice and information supporting request], 456 [trial court must indicate for the record if it denies a request for judicial notice]; see also *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 918-919.)

SAG). The loan was secured by a deed of trust on the Property, recorded in March 2007. The deed of trust lists AFTRA SAG as the "lender" and T.D. Service Company as the "trustee." It also notes Mortgage Electronic Registration Systems, Inc. (MERS), "acting solely as a nominee for Lender and Lender's successors and assigns," was the "beneficiary under this Security Instrument."

In 2014, MERS, as nominee for AFTRA SAG, granted, assigned, and transferred all beneficial interest under the deed of trust to HSBC. Around the same time, SPS recorded a substitution of trustee that substituted National Default as the new trustee in place of T.D. Service Company and noted SPS was the present beneficiary under the deed of trust.

National Default later recorded a notice of default and election to sell under deed of trust. Notices of trustee's sale were subsequently recorded in January 2015 and May 2016.

Plaintiff, representing himself, filed a complaint against defendants in December 2016. The complaint asserted two causes of action: (1) cancellation and expungement of the substitution of trustee and deed of trust; and (2) declaratory relief. In January 2017, plaintiff filed a notice of lis pendens based on his complaint. The trial court signed the lis pendens order the following day.

Defendants demurred to the complaint, arguing it failed to state facts sufficient to constitute a valid cause of action and was unintelligible. In connection with their demurrer, defendants requested judicial notice of various documents related to the Property and the deed of trust.

The trial court sustained the demurrer without leave to amend. The record on appeal does not include a reporter's

transcript of the demurrer hearing or a minute order memorializing the trial court's ruling. Though the record does include a notice of ruling, it merely states the demurrer was "sustained without leave as to the causes of action raised therein." According to the notice of ruling, plaintiff was given until August 8, 2017, to file a motion for leave to amend his complaint to add other potentially viable causes of action. The court also set a hearing on an "Order to Show Cause re: Dismissal" for August 9, 2017, indicating it would dismiss the case as a matter of course at the hearing if no motion for leave to amend was filed.

On August 8, 2017, plaintiff filed a first amended complaint without submitting a motion for leave to amend. The first amended complaint alleged eight causes of action: (1) wrongful foreclosure; (2) violation of Civil Code section 2924.17; (3) vacate and set aside trustee's sale; (4) cancellation of trustee's deed upon sale; (5) cancellation of instrument; (6) quiet title; (7) violation of Business and Professions Code section 17200; and (8) cancellation of mortgage. Unlike the original complaint, the amended complaint alleged the foreclosure sale of the Property had taken place.

The day after plaintiff filed the amended complaint with no motion to amend, the trial court held the previously scheduled order to show cause hearing to consider why the matter should not be dismissed without prejudice. The trial court's tentative ruling, which it ultimately adopted, recounted that the demurrer to the complaint had been sustained without leave to amend and plaintiff had been "given leave to file a motion to permit new causes of action or the court would dismiss the action." The trial court stated "[n]o motion for leave to file an amended pleading

was filed by 60 days after the ruling on 6/8/2017 (or by 8/7/2017)" and the court accordingly ordered the action dismissed with prejudice. No reporter's transcript for this order to show cause hearing is included in the record.

After the court ordered the action dismissed, plaintiff engaged an attorney to represent him and filed a notice of substitution of counsel. Plaintiff also filed (through counsel) an "Ex Parte Motion for an Order Granting Leave to Amend Complaint." The memorandum of points and authorities submitted in support of this filing argued plaintiff had been self-represented and thus had not been able to sufficiently articulate possible viable causes of action he might have. Accompanying the motion were two declarations from plaintiff.

The first two-page declaration was styled as a "Declaration in Support of Plaintiff's Ex Parte Motion for Relief from Default and Default Judgment." The declaration averred plaintiff tried to file his first amended complaint on August 7, but, due to traffic, he did not manage to file it until the following day. The declaration further represented plaintiff had not understood he needed to file a motion for leave to amend, had thought he complied with the court's order, and had retained counsel to assist him going forward.

Plaintiff's second two-page declaration was styled as a "Declaration in Support of Plaintiff's Ex Parte Motion for Leave to Amend Complaint." This declaration reiterated plaintiff's reason for filing his complaint on August 8, stated he had come to understand there were other causes of action he could allege and had retained counsel to assist him, and had not previously understood the trial court was asking him to file a motion for leave to amend.

The trial court denied plaintiff's "Ex Parte Motion." The appellate record does not include a reporter's transcript from the hearing, but a notice of entry of order filed by defendants states plaintiff "appeared specially through appearance counsel Christian Lloyd Woods," a different attorney from the attorney who submitted the ex parte filing and who was listed on plaintiff's notice of substitution of counsel. The notice also attached the trial court's one-page order denying the ex parte.

The written order states plaintiff could not have an attorney "specially appear" at a hearing to request relief because plaintiff was self-represented. The court noted it would not consider an application for relief by an attorney until he substituted in permanently or through a limited scope representation. In addition, the order stated no default or default judgment had been entered, "so that part of the application is without substance." Further, the trial court's order concluded there were no grounds to permit plaintiff to file an amended complaint. The court stated plaintiff had requested leave to amend "which the court granted conditional upon the amended complaint being filed within 60 days," and that time had expired. The court observed that "[a]s the time has expired to file an amended complaint, [p]laintiff must now assert his causes of action by the filing of a new complaint."

The trial court filed the judgment of dismissal on August 28, 2017. The judgment also expunged the lis pendens.

II. DISCUSSION

Plaintiff challenges the trial court's decision to sustain his demurrer without leave to amend (not the underlying decision to sustain the demurrer itself) and the trial court's denial of his "Ex

Parte Motion" to file an amended complaint. We review both rulings under the abuse of discretion standard. As the appellant, plaintiff bears the burden of affirmatively demonstrating the trial court erred based on an adequate record of the proceedings below. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) Plaintiff has not met that burden because the record presented has fatal deficiencies: it does not include reporter's transcripts (or adequate substitutes) for the key hearings, nor does it include any document that explains the trial court's reasons for denying leave to amend. We will therefore affirm the trial court's order sustaining the demurrer without leave to amend. We will also affirm the trial court's order denying plaintiff's ex parte filing seeking leave to amend the complaint, both because plaintiff has not presented an adequate record and because plaintiff's arguments do not demonstrate the trial court abused its discretion on the record that is before us.

A. Standard of Review

Where the trial court sustains a demurrer without leave to amend, the denial of leave to amend is reviewed for abuse of discretion. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081; *Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 819.) A trial court's ruling on a motion for leave to amend a pleading is also reviewed under the abuse of discretion standard. (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1162-1163.) "The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the

governing rules of law." (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.)

B. Plaintiff Has Not Demonstrated the Trial Court Abused Its Discretion by Denying Leave to Amend

"'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.'" (*Denham*, *supra*, 2 Cal.3d at p. 564.) "In the absence of a contrary showing in the record, all presumptions in favor of the trial court's action will be made by the appellate court." (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.)

The California Rules of Court require an appellant to provide a reporter's transcript if "an appellant intends to raise any issue that requires consideration of the oral proceedings in the superior court . . . ." (Cal. Rules of Court, rule 8.120(b).) Where the standard of review is abuse of discretion, as it is here, a transcript or settled statement is in many cases indispensable. (*Southern California Gas Co. v. Flannery* (2016) 5 Cal.App.5th 476, 483 (*Flannery*).)

The record on appeal does not include a reporter's transcript (or a settled or agreed statement) memorializing what transpired during the demurrer hearing.[2] Nor does it contain any

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[2] On April 3, 2018, we asked the parties to brief whether plaintiff's failure to designate a reporter's transcript or suitable substitute warrants affirmance based on the inadequacy of the record. Plaintiff did not address this issue in his opening brief.

document explaining the trial court's reason for denying leave to amend. The record includes only defendants' notice of ruling, which provides no clue as to the trial court's reasons.

As a consequence, there is no basis for a finding the trial court abused its discretion on the issue of whether to allow amendment of the complaint. Because the record and the argument on appeal are insufficient to demonstrate the court abused its discretion, plaintiff has not carried his burden to affirmatively show error.

Further, although an appellate court may grant leave to amend in the first instance (see, e.g., *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371), plaintiff makes no argument on appeal concerning how his proposed amended complaint states a viable cause of action. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 890 [the burden to show what facts could be pleaded to state a cause of action if allowed the opportunity to replead "falls squarely on [plaintiff]"]; see also *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43-44 ["The assertion of an abstract right to amend does not satisfy this burden"] (*Rakestraw*).) Though the record contains a copy of the first amended complaint plaintiff filed without leave, plaintiff's appellate briefing does not reference it or its allegations, much less cite any legal authority demonstrating the viability of its causes of action. (See generally *Rakestraw*, *supra*, at p. 43 ["The plaintiff must clearly and specifically set forth the 'applicable substantive law' [citation] and the legal basis for amendment, i.e., the elements of the cause

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Defendants contend the inadequacy of the record warrants affirmance.

of action and authority for it"].) The upshot of all this is that any attempt by plaintiff to satisfy his burden of affirmatively demonstrating trial court error is doubly deficient.

C. The Record Does Not Establish the Trial Court Abused Its Discretion by Denying His "Ex Parte Motion"

Plaintiff's challenge to the trial court's denial of his ex parte submission fails for similar reasons. Plaintiff has not provided this court with a reporter's transcript of the ex parte hearing. Such a record of the proceedings is indispensable here. (See, e.g., *Flannery*, *supra*, 5 Cal.App.5th at p. 483.) Although the record on appeal contains the court's abbreviated written order following the hearing, it does not indicate what was—or was not—argued or presented during the hearing and that information is important to assessing whether the trial court acted unreasonably. Moreover, even if we were to consider the substance of the arguments that plaintiff does raise on appeal concerning his ex parte submission, the result would be the same on the record we have.

The trial court did not err in finding the part of plaintiff's ex parte submission referring to relief from default (i.e., one of his two declarations) to be undeserving of relief. Although, as plaintiff contends, Code of Civil Procedure section 473, subdivision (b) authorizes discretionary relief from some orders other than an entry of default or a default judgment, that has no bearing here because plaintiff did not request relief under that section. Rather, plaintiff (through retained counsel) filed a single "Ex Parte Motion" that sought an "order allow[ing] Plaintiff to file a First Amended Complaint with the addition of causes of

action . . . ." The memorandum of points and authorities confirmed plaintiff's ex parte submission sought only leave to amend his complaint. The caption of one of plaintiff's declarations is insufficient to expand the relief sought, and no other motion seeking relief under Code of Civil Procedure section 473 was filed. (See *Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1125 ["As a general rule, the trial court may consider only the grounds stated in the notice of motion"].)

In addition, we cannot conclude on the record before us that the trial court abused its discretion by noting plaintiff could not have an attorney "specially appear" at the hearing to request relief. Generally, an attorney may appear on behalf of a party only if the attorney is the attorney of record. (See Code Civ. Proc., §§ 284 [substitution of attorney permissible with consent of party and attorney], 285 [notice of substitution to be given to opposing party]; *Epley v. Califro* (1958) 49 Cal.2d 849, 854 [court should recognize the attorney of record, not the party or another attorney].) A trial court has broad discretion in deciding whether to allow an attorney to appear specially at a hearing. (See *Ross v. Ross* (1953) 120 Cal.App.2d 70, 74.)

The record indicates plaintiff had retained an attorney to represent him prior to the ex parte hearing. The trial court's statement to the contrary, i.e., that plaintiff was self-represented at time of the hearing, may therefore be inaccurate. But the only record of the hearing we have, the notice of ruling, states an attorney different from the one whose name appears on the substitution of counsel (and on the ex parte filing) was the one who sought to appear on plaintiff's behalf. The record does not reveal how that attorney came to make his appearance or what the attorney said to the trial court to justify the "special

appearance." Nor is there any indication in the record that the attorney who appeared had, in fact, been retained to represent plaintiff. In the absence of evidence regarding what transpired at the hearing, why the appearance attorney was present, what his relationship was to plaintiff, and whether the previously substituted attorney had been relieved, we cannot conclude the trial court was in error.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

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BAKER, Acting P. J.

I concur:

MOOR, J.

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JASKOL, J., Concurring

I concur in the judgment. I do not see any justification for requiring the self-represented plaintiff to file a motion for leave to file an amended complaint after the trial court sustained the defendants' demurrer, but on this record I cannot conclude any error was prejudicial.

JASKOL, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.